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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOYCE MARIE THOMAS,

Defendant and Appellant.

F042959

(Super. Ct. No. 671218-6)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez, Judge.

Randi Covin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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**FACTUAL AND PROCEDURAL BACKGROUND**

An information charged Joyce Marie Thomas with three counts of resisting an executive officer (“resisting”), two counts of assault on a public official (“assault”), and one count of riot. (Pen. Code, §§ 69, 217.1, subd. (a), 404, subd. (a).) At trial, Thomas

requested, and the court gave, CALJIC No. 2.21.2 on a witness willfully false. A jury found her not guilty of one count of resisting, guilty of one count of resisting, guilty of two counts of assault, and guilty of riot. In the interest of justice, the court dismissed the one count of resisting on which the jury deadlocked.

On appeal, Thomas argues that CALJIC No. 2.21.2 impermissibly lowers the prosecution's burden of proof below reasonable doubt and that the court committed two sentencing errors, one involving Penal Code section 654, the other involving presentence credits. We will reject her instructional argument, agree with both of her sentencing arguments, remand with directions to modify the judgment, and affirm the judgment as modified.

## **DISCUSSION**

### **1. CALJIC No. 2.21.2**

In response to Thomas's argument that CALJIC No. 2.21.2 impermissibly lowers the prosecution's burden of proof below reasonable doubt, the Attorney General argues the invited error doctrine bars appellate review and, on the merits, the instruction passes constitutional muster. In the interest of judicial efficiency, we will assume *arguendo* the invited error doctrine is inapplicable and will address on the merits the argument Thomas raises solely to preserve her right to federal review.

Thomas acknowledges not only that the California Supreme Court has rejected a like challenge to the standard jury instruction on a witness willfully false (*People v. Riel* (2000) 22 Cal.4th 1153, 1200) but also that we have the duty to follow, and have no authority to overrule, opinions of the California Supreme Court (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Commending her candid and competent appellate advocacy, we reject her argument.

**2. Penal Code section 654**

Thomas argues, the Attorney General agrees, and we concur the court committed a sentencing error by not imposing a stay on either the resisting count or the assault count since both involved the same police officer (counts 11 and 12). We will remand with directions to impose a Penal Code section 654 stay on one of those two counts.

**3. Presentence Credits**

Thomas argues, the Attorney General agrees, and we concur the court erroneously granted 214 days (143 days of actual custody plus 71 days of conduct credits) instead of 216 days (144 days of actual custody plus 72 days of conduct credits) of presentence credits. We will remand with directions to grant the correct number of days of presentence credits.

**DISPOSITION**

The matter is remanded with directions to impose a Penal Code section 654 stay on one of the two counts involving the same police officer (counts 11 and 12), to grant 216 days of presentence credits (144 days of actual custody plus 72 days of conduct credits), and to issue and to send to the appropriate persons an amended abstract of judgment. The judgment as so modified is affirmed.

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Gomes, J.

WE CONCUR:

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Levy, Acting P.J.

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Cornell, J.